

requisite efforts only served to emphasize the paramount importance apparently attached to good faith efforts.^{18/}

Basing imposition of a forfeiture upon the number of minorities included in individual applicant pools does not accurately measure a licensee's actual EEO efforts. For example, if a licensee had 100 applicant pools, 1000 applications, and one minority applicant in each applicant pool, it would substantially exceed the Policy Statement's 66% guidelines. By contrast, a licensee which also had 100 applicant pools and 1000 applications, but whose 100 minority applicants were distributed less equally (such as 4 applicants in each of 25 applicant pools) would not satisfy the guidelines and would be subject to sanctions, even though its recruitment efforts had precisely the same result in terms of the presence of minority applicants as those of the first licensee. Further, if a third licensee had 100 applicant pools and 1000 applications, and 200 minority applicants distributed in only 20 applicant pools, its recruitment efforts would be considered even less effective under the Policy Statement's standards, even though they had

18/ See, e.g., California License Renewals, FCC 91-134 (May 3, 1991) at par. 16 (criticizing a licensee because "[i]t places undue emphasis on meeting the processing guidelines rather than consistently engaging in EEO efforts to attract minority applicants when vacancies occur."), citing Park Communications, Inc., 3 FCC Rcd 1907, 1909-1910 (1988); Arkansas License Renewals, FCC 91-238 (August 15, 1991).

clearly been far more effective in attracting minority applicants.

Similarly, this interpretation discriminates against stations located in areas with relatively small minority group populations. For example, assume that a station located in an area with 10% minority population obtained 100 applications for 100 job openings, 40 of which were received from members of minority groups. That station's recruitment efforts were clearly successful -- minorities were recruited at a rate equal to four times work force parity -- yet the station would nonetheless subject to sanctions under the first interpretation.

The Policy Statement's apparent focus upon one measure of the success of, rather than the fact of, recruitment efforts also penalizes stations which in good faith engaged in significant recruitment efforts but whose efforts were unsuccessful. As noted above, the Commission has repeatedly emphasized that its EEO enforcement focus would be on licensees' recruitment efforts. The Policy Statement apparently moves beyond this obligation to require that efforts not only occur, but that they be successful.

No licensee can guarantee that its recruitment contacts will result in referrals. Results are completely beyond a licensee's control. To impose penalties in those circumstances is patently unfair. A licensee cannot control

or affect the fact that, for whatever unknown reason, a particular source fails to refer minority applicants in response to a request. Yet the Commission proposes to impose sanctions for precisely that reason.

The inequity of that result is particularly evident in the fact that stations in a single market may frequently contact the same recruitment sources -- with far different results. To sanction some market stations and not others based solely on the happenstance that one station's recruitment contacts were fortuitously more successful than another's, is obviously unfair. Yet the Commission's apparent interpretation of its Policy Statement would produce that result.

DL&A respectfully submits that the Commission should focus on actual recruitment efforts. The Policy Statement's apparent emphasis on the number of particular applicant pools which includes minorities does not measure the actual extent of a licensee's recruitment efforts, and efforts are supposed to be the touchstone of EEO enforcement.

A better measure of those efforts is the proportion of job vacancies for which affirmative recruitment outreach efforts were made, possibly supplemented by some consideration of proportionate minority and female representation in all applicant/interview pools

or minority/female offers^{19/} or hires over the relevant license term compared with relevant labor force representation.

Adequate Pool. The Policy Statement repeatedly uses the term "adequate pool of minority/female applicants or hires." Nowhere, however, does it define what an adequate pool is. Given the critical importance of adequate pools to the Policy Statement's enforcement standards, the Commission must define the term, indicating, for example, whether the concept measures persons referred as the result of recruitment contacts who inquire about a position; persons who actually complete and submit applications; and/or persons who are interviewed; and whether there any particular combinations of these groups which would be considered relevant. Further, the Commission should clarify what level of such results is considered "adequate."^{20/}

License Term. The Policy Statement proposes to measure recruitment efforts throughout "the license term being reviewed." However, EEO inquiries which are routinely sent to licensees generally relate to far less than full

^{19/} The Commission should explicitly hold that unaccepted offers of employment to minorities and women are considered on the same basis as instances in which such offers are accepted.

^{20/} DL&A suggests that the definition adopted be tied to minority/female labor force representation and that adequate be defined as 50% of parity with labor force representation.

five- and seven-year license terms. Upward adjustments are imposed if there has been a large number of hiring opportunities but an insufficient pool of applicants/offers/hires;^{21/} again, the Policy Statement does not specify the time period which will be considered. DL&A respectfully requests the Commission to clarify the time period on which its forfeiture determinations will be based and to provide guidance as to proper record retention procedures for licensees.

Other Matters

Fulltime/Parttime Employment. The Policy Statement does not distinguish between fulltime and parttime employment. However, the decisions implementing it do make the distinction. DL&A respectfully suggests that full- and parttime employment should both be considered in applying the Policy Statement.

There is neither legal basis nor logic in disregarding or discounting parttime employment. The terms of the Commission's rules are not limited to fulltime employment. Inquiries on FCC Form 396 are not limited to parttime employees. The FCC Form 395-B specifically asks for information concerning parttime employment. The Commission's regularly published Broadcast and Cable

^{21/} The Commission does not specify whether it will look at applicants or hires or both; clarification is also appropriate in this regard.

Employment Trend Reports describe total employment, not fulltime employment only. Labor force statistics against which stations' minority employment profiles are measured include both full- and parttime employees. In other words, there is absolutely no legal reason for the Commission to disregard licensees' efforts as they involve employment of minorities or women on a parttime basis.

There is also no practical reason for such a result. Parttime employees play a significant role in station operations and often represent a significant portion of station employees. The nature of the broadcast industry, involving specialized formats and programs, and requiring both weekend as well as Monday-Friday technical and operational shifts, lends itself to parttime employment.^{22/} A station's use of parttime employees thus reflects the nature of the industry, not any attempt to minimize employment opportunities.

Moreover, parttime employment can also be a steppingstone to fulltime positions or to positions in other

^{22/} For example, the NAB/BCFM 1991 Radio Financial Report indicates that in 1990, parttime employees represented a significant portion of radio stations of all sizes: for example, an average of 19.6% of employees at stations with revenues above \$16 million; an average of 23.1% of employees at stations with revenues from \$13 to 16 million; an average of 20.7% of employees at stations with revenues from \$7 to 8 million; an average of 24.2% of employees at stations with revenues from \$1.5 - 2 million; an average of 37.5% of stations with revenues from \$700,000 - 800,000; and 44.4% of employees with revenues from \$100,000 - 200,000.

media. Parttime employment also can reflect a station's accommodation to facilitate employees in their pursuit of other interests or personal needs. For example, employees may seek parttime work while they continue their education or to supplement income through a second job.

Arbitrary disregard of parttime minority and female employment when evaluating licensees' EEO efforts thus cannot be justified in either fact or law. DL&A thus respectfully urges the Commission to clarify that the Policy Statement will be applied with respect to both fulltime and parttime employment.

Low Percentage of Minorities in Relevant Population. A downward adjustment is available in circumstances in which minorities constitute less than 6% of the relevant labor force. Since stations located in areas where minorities constitute less than 5% of the relevant labor force are not even required to adopt EEO programs with respect to minorities, this downward adjustment has little, if any practical impact. DL&A suggests that the benchmark for the availability of this downward adjustment be increased to 10% of the relevant labor force.

"50/50" EEO Processing Guidelines. The Commission has long used "50/50" EEO processing guidelines, and, indeed, recently reaffirmed their importance.^{23/} The

23/ 1993 EEO Report, supra.

Policy Statement fails to reference those guidelines or to explain their relationship with the new "66%/33%" requirements. DL&A respectfully requests that the Commission clarify the future role of the "50/50" guidelines and their relationship to the new guidelines announced by the Policy Statement.

Self-Assessment/Recordkeeping. Many licensees are generally aware of the effectiveness of their EEO recruitment procedures yet do not necessarily conduct, or create substantial records concerning, formal review and evaluation thereof. (This is particularly true at smaller stations.) Commission decisions have indicated the importance of self-assessment and EEO recordkeeping but have provided little guidance as to the specifics of its expectations in this regard. DL&A respectfully requests that the Commission clarify in more detail the nature and frequency of the EEO self-assessment it expects of its licensees, and the circumstances in which such self-assessment is required.^{24/}

^{24/} For example, does the Commission expect formal self-assessment in circumstances in which a licensee's employment profile complies with its "50/50" EEO processing guidelines? Is it permissible to stop using a recruitment source which has not been productive?

Conclusion

DL&A reiterates that both it and its clients are committed to equal employment opportunity and to aggressive affirmative measures to further such opportunity. It would support a prospective policy statement which clearly informs licensees of the Commission's general expectations with respect to equal employment opportunity. The Policy Statement which has been issued, however, constitutes retroactive application of newly-announced substantive standards which is not only prohibited by statute but which is fundamentally unfair to licensees which had no prior notice of the standards by which their actions would be judged. DL&A therefore respectfully requests that the Commission rescind the Policy Statement.

At a minimum, the Commission should clarify its requirements as set forth herein. In particular, the Policy Statement's guidelines do not measure EEO efforts in any realistic terms and can be applied so as to completely discount tangible efforts of licensees which have in good faith consistently implemented an effective EEO Program. At

a minimum, the Commission should clarify that the Policy Statement's new "66%/33%" standard applies to recruitment efforts undertaken, not to the results of those efforts.

Respectfully submitted,

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March 3, 1994

DECLARATION OF ROBERT F. RUSSELL

(Original to be filed upon receipt)

DECLARATION OF ROBERT F. RUSSELL

I am the General Manager of Radio Stations KGNC and KGNC-FM, Amarillo, Texas. In that position, I am responsible for implementation of the stations' EEO Program. I have read the "Petition for Reconsideration" and associated Exhibit No. 1 and am familiar with their contents. The pleading and the attachments thereto are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 2, 1994.


Robert F. Russell

CERTIFICATE OF SERVICE

This will certify that a complete copy of the foregoing "Petition for Reconsideration" was sent this 3rd day of March, 1994, United States mail, postage prepaid, to the following:

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March 3, 1994